Supreme Court, U.S.
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No. 97-1662

In The

Supreme Court of the United States

October Term, 1997

PAUL CLARK,

Petitioner,

versus

ROY ANDERSON CORPORATION AND
R.A. BUILDING CORPORATION,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit**

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether Petitioner has presented a compelling reason for this Court to grant certiorari.

2. Whether the evidence was insufficient under settled legal standards to support Petitioner's claim that summary judgment was inappropriate under the facts presented in the record.

3. Whether the Court should expend judicial resources on a case which summary judgment would be appropriate on additional grounds under this Court's holding in *Harbor Tug & Barge Co. v Papai*, ___ U.S. ___, 117 S. Ct. 1535, 137 L.Ed.2d 800 (1997).

PARTIES TO THE PROCEEDING

1. Paul Clark
2. Roy Anderson Corporation (parent corporation – R.A. Holding Corporation)
3. R. A. Building Corporation

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

CITATION OF OPINION AND ORDERS 1

BASIS FOR JURISDICTION 1

APPLICABLE STATUTES 1

STATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 2

REASONS FOR DENYING CERTIORARI 3

I. THE PETITIONER HAS NOT PRESENTED A COMPELLING REASON FOR THIS COURT TO GRANT CERTIORARI 3

II. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT PETITIONER'S CLAIM THAT THERE WAS A JURY QUESTION AS TO WHETHER THE BARGE IN QUESTION WAS A "VESSEL". ACCORDINGLY, SUMMARY JUDGMENT WAS APPROPRIATE 7

III. THIS COURT SHOULD NOT EXPEND VALUABLE JUDICIAL RESOURCES ON A CASE IN WHICH THE SAME RESULT IS MANDATED ON SIMILAR ISSUES 11

CONCLUSION 13

APPENDIX A ..... App. 1

APPENDIX B ..... App. 4

TABLE OF AUTHORITIES

Page

CASES

Bernard v. Binnings Const. Co., 741 F.2d 824 (5th Cir. 1984) 6

Brunet v. Boh Brothers Construction Co., 715 F.2d 196 (5th Cir. 1983) 5

Celotex Corp. v. Catrett, 47 U.S. 317, 106 S. Ct. 2548, 19 L.Ed.2d 265 (1986) 10

Chandris, Inc. v. Latsis, 515 U.S. 347, 115 S. Ct. 2172, 132 L.Ed.2d 314 (1995) 4, 12, 13

Cook v. Belden Concrete Products, Inc., 472 F.2d 999 (5th Cir. 1973) 4, 6

DiGiovanni v. Traylor Brothers, Inc., 959 F.2d 1119 (1st Cir. 1992) 6

Ducrepont v. Baton Rouge Marine Enterprises, Inc., 877 F.2d 393 (5th Cir. 1989) 6

Ellender v. Kiva Construction & Engineering, Inc., 909 F.2d 803 (5th Cir. 1990) 6, 9

Harbor Tug & Barge Co. v. Papai, ___ U.S. ___, 117 S. Ct. 1535, 137 L.Ed.2d 800 (1997) 3, 4, 11

Hatch v. Durocher Dock & Dredge, Inc., 33 F.3d 545 (6th Cir. 1994) 5

Hurst v. Pilings & Structures, Inc., 896 F.2d 504 (11th Cir. 1990) 6

Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 115 S. Ct. 1043, 130 L.Ed.2d 1024 (1995) 8, 11

Kathriner v. UNISEA, Inc., 975 F.2d 657 (9th Cir. 1992) 6

TABLE OF AUTHORITIES – Continued

Page

Lane & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 43 S. Ct. 422 (1923) 8

Manuel v. P.A.W. Drilling & Well Service, Inc., 135 F.3d 344 (5th Cir. 1998) 9

Pavone v. Mississippi Riverboat Amusement Corp., 52 F.3d 560 (5th Cir. 1995) 2

Robert W. Parsons, 191 U.S. 17, 24 S. Ct. 8, 48 L.Ed. 73 (1903) 4, 6

Smith v. Butler, 366 U.S. 161, 81 S. Ct. 937 (1961) 8

Tonneson v. Yonkers Contracting Co., Inc., 82 F.3d 30 (2nd Cir. 1996) 5

STATUTES

28 U.S.C. §2101(c) 1

46 U.S.C. §688 ..... 1, 3

RULES

Sup. Ct. R. 10 7

CITATION OF OPINION AND ORDERS

1. United States District for the Southern District of Mississippi, Southern Division, Memorandum entered on November 12, 1996 in Civil Action No. 1:95-cv-585RR.

2. United States District Court for the Southern District of Mississippi, Southern Division, entry of Summary Judgment on December 11, 1996 in Civil Action No. 1:95-cv-585RR.

3. United States Court of Appeals for the Fifth Circuit No. 96-60867, appeal affirmed, on August 15, 1997.

BASIS FOR JURISDICTION

28 U.S.C. §2101(c) is the statutory provision which confers jurisdiction upon this Court to review this Petition for Writ of Certiorari.

APPLICABLE STATUTES

46 U.S.C. §688

STATEMENT OF THE CASE

On May 1, 1994, the Petitioner, Paul Clark, worked as a crane rigger at the Boomtown Casino construction site. On that date, the Petitioner alleges that he slipped and fell on an oil patch while working on a barge, thus causing him to injure his foot and leg. The crane barge on which the plaintiff alleges he was injured was used for

construction purposes on the navigable waters of Biloxi's Back Bay in construction of the Boomtown casino.[1] Frank Jenkins, Project Superintendent for Roy Anderson Corp. (hereinafter "RAC") on Boomtown Casino's site, testified that the crane which was on the barge was owned by RAC, that RAC placed the crane on the barge, the crane slid forward from one end to the other of the barge and the crane was used to build the back side of the casino since it could not be reached by cranes from shore. At the time of plaintiff's alleged injury, the plaintiff was assisting the crane in reaching some materials. Other than being moved from time to time by means of a tugboat to other areas immediately within the construction site, the crane barge was at all other times stationary. The crane barge was securely held in place by two large pilings ("big pins") which went down into the dirt.

SUMMARY OF THE ARGUMENT

The crane barge on which plaintiff was working at the time of this accident and injury and to which he alleges he was permanently assigned, was used for construction purposes. It was only occasionally moved by tugboat for short distances about the construction site. At all other times, it was affixed to the floor of the Back Bay

[1] The status of the Boomtown casino as a "vessel" is not in issue in this case. Boomtown Casino clearly would be adjudicated as a "non-vessel" based upon the 5th Circuit's holding that the Biloxi Belle is a non-vessel. *Pavone v. Mississippi Riverboat Amusement Corp.*, 52 F.3d 560 (5th Cir. 1995).

of Biloxi by two large pilings. The transportation function, if any, of the barge was merely incidental to its primary function as a work platform. As such, it is an "unconventional craft" which is not a vessel in navigation for Jones Act purposes. Since the crane barge to which plaintiff claims assignment is not such a vessel, plaintiff is not a Jones Act seaman. Thus, his claim against the defendants under the Jones Act must fail.

REASONS FOR DENYING CERTIORARI

I.

THE PETITIONER HAS NOT PRESENTED A COMPELLING REASON FOR THIS COURT TO GRANT CERTIORARI.

The first question which Petitioner presents for review is whether the United States Court of Appeals for the Fifth Circuit definition of a Jones Act vessel is too restrictive. The Jones Act, 46 U.S.C. §688 does not specifically provide a definition of the term "vessel". However, this Court has repeatedly held that in order for a claimant to be entitled to seek remedies under the Jones Act as a seaman, two essential requirements must be met. First, the employee's duties must contribute to the function of a **vessel** or to accomplishment of its mission and second, the employee must have a connection to a **vessel** in **navigation** or to an identifiable group of such vessels that is both substantial in its terms of both duration and nature. *Harbor Tug & Barge Co. v. Papai*, ___ U.S. ___, 117 S. Ct. 1535, 137 L.Ed.2d 800 (1997). (**Emphasis added**). Therefore, the United States Court of Appeals for the

Fifth Circuit, as well as several other United States Courts of Appeals have developed and relied upon well established principles for determining whether a purported structure is a "vessel" under the Jones Act.

In *Robert W. Parsons*, 191 U.S. 17, 30, 24 S. Ct. 8, 12, 48 L. Ed. 73 (1903) the Court discussed what types of features are significant in determining whether a structure is a "vessel." The Court stated that "neither size, form, equipment nor means of propulsion are determinative factors upon the question of jurisdiction, **which regards only the purpose for which the craft was constructed, and the business in which it is engaged**." **(Emphasis added)**. *Robert W. Parsons*, 191 U.S. 17, 30, 24 S. Ct. 8, 12, 48 L. Ed. 73 (1903). In *Cook v. Belden Concrete Products, Inc.*, 472 F.2d 999 (5th Cir. 1973) the Fifth Circuit Court of Appeals adopted this as a threshold jurisdictional test for the purpose of determining whether or not a person is entitled to assert a claim under the Jones Act. As this Court has repeatedly held, Jones Act coverage is confined to "seamen," those workers who face regular exposure to the perils of the sea. *Papai, supra* at 1542-43; *see Chandris, Inc. v. Latsis*, 515 U.S. 347, 368-72, 115 S. Ct. 2172, 2185, 2190, 132 L.Ed.2d 314 (1995) (reiterating that under Jones Act and maritime law, "seamen" does not include land-based workers and further holding that "Jones Act remedy is reserved for sea-based maritime employees whose work regularly exposes them to 'the special hazards and disadvantages to which they who go down to sea in ships are subjected' ") (citation omitted). Accordingly, since the Jones Act is only intended to provide broad remedies to

cover a distinct class of individuals,[2] the court of appeals and the district courts of the United States have looked to the threshold jurisdictional question of whether a "vessel" exists when a person alleges his/her status as a Jones Act seaman. *Tonneson v. Yonkers Contracting Co.*, 82 F.3d 30, 33 (2nd Cir. 1996) (holding that prerequisite to seaman status and, thus, to recovery under Jones Act is existence of "vessel in navigation").

The courts of appeal and the federal district courts of the United States have commonly submitted this objective inquiry to a jury when there is question as to whether the alleged "vessel" is used for purpose of transporting passengers, cargo or equipment from one place to another across navigable waters. *Tonneson*, 82 F.3d at 36 (holding that summary judgment was inappropriate where there was testimony that the barge in question " 'help[ed] to bring construction supplies to the area' "); *Brunet v. Boh Brothers Construction Co.*, 715 F.2d 196, 198 (5th Cir. 1983) (holding that transportation function of barge in question was more than incidental where the barge had been moved four times over a six-month period and was designed by necessity to transport a pile-driving crane to various job sites). However, where there has been no showing that the alleged "vessel" served a transportation function which was more than incidental to its primary purpose, the courts have found that summary judgment is appropriate. *Hatch v. Durocher Dock & Dredge, Inc.*, 33 F.3d 545, 547-48 (6th Cir. 1994) (holding that primary purpose of flatdeck barge was construction rather than

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[2] *Hatch v. Durocher Dock & Dredge, Inc.*, 33 F.3d 545, 546 (6th Cir. 1994).

transportation or commerce); *DiGiovanni v. Traylor Brothers, Inc.*, 959 F.2d 1119 (1st Cir. 1992) (holding that barge in question was not a Jones Act vessel where the barge had transported nothing for a month and was only moved about piers for working convenience and at night for safety); *Kathriner v. Unisea, Inc.*, 975 F.2d 657 (9th Cir. 1992) (holding that floating fish processing plant was not a "vessel in navigation" and citing *DiGiovanni, supra, Ellender v. Kiva*, 909 F.2d 803 (5th Cir. 1990), *Ducrepont v. Baton Rouge Marine Enterprises, Inc.*, 877 F.2d 393 (5th Cir. 1989) and *Bernard v. Binnings Const. Co., Inc.*, 741 F.2d 824, 832 (5th Cir. 1984)); *Ellender v. Kiva*, 909 F.2d 803 (5th Cir. 1990) (holding that the barge in question was not a Jones Act vessel where the barge was built primarily to serve as a work platform, had no independent means of navigation, and was securely anchored at time of accident); *Hurst v. Pilings & Structures, Inc.*, 896 F.2d 504 (11th Cir. 1990) (affirming summary judgment where spud barge was constructed for purpose of serving as work platform, was engaged as work platform at time of accident, and its only transportation function was incidental to its primary purpose of serving as a work platform). Of course, "capability to sustain movement is insufficient to establish that a purported 'vessel' is constructed for the purpose of navigation." "[S]ome movement, both perpendicular and lateral, is necessarily part of the regular operation of floating dry docks and similar structures." *Cook v. Belden*, 472 F.2d at 1002. In the case *sub judice* the District Court specifically found, and the Fifth Circuit Court of Appeals affirmed, that "[t]here was nothing before the Court to show that the barge was used in maritime activity" and that the only evidence before the Court showed that the

barge in question was used as nothing more than a work/construction platform. *See District Court's Order* in Appendix C at page 15a of Petition for Writ of Certiorari. Thus, Petitioner has not presented an issue for review that is: in "conflict with a decision of another United States court of appeals on the same matter;" an issue on "an important federal question in a way that conflicts with a decision by a state court of last resort" . . . "or of a United States court of appeals;" "depart[ing] from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for this Court's supervisory power;" an important question of federal law that should be settled by this Court; or an important federal question decided in a way that conflicts with relevant decisions of this Court. Sup. Ct. R. 10. Consequently, Petitioner has failed to show pursuant to Supreme Court Rule 10 Considerations Governing Review on Certiorari that there is any compelling reason for this Court to grant Petitioner's Writ.

II.

THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT PETITIONER'S CLAIM THAT THERE WAS A JURY QUESTION AS TO WHETHER THE BARGE IN QUESTION WAS A "VESSEL". ACCORDINGLY, SUMMARY JUDGMENT WAS APPROPRIATE.

The only issue in this case is whether there was insufficient evidence to support Petitioner's claim that the barge used in the construction of a dockside casino was properly granted summary judgment. Such an evidentiary issue in which the District Court itself found no facts to support the Plaintiff's claim and in which the United States Court of Appeals for the Fifth Circuit

affirmed is not the type of issue in which this Court ordinarily grants a writ of certiorari. *See Lane & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 43 S. Ct. 422 (1923); *Smith v. Butler*, 366 U.S. 161, 81 S. Ct. 937 (1961).

Moreover, reviewing the record evidence as it was required to do, the Court of Appeals correctly concluded that the evidence was insufficient as a matter of law to establish a jury question as to the issue of seaman status since there were no facts to support a finding that the barge in question was in fact a "vessel". In reviewing this issue, the Court of Appeals did not purport to make its own de novo findings of fact nor did it usurp the fact finding function of the District Court. Instead, the Court of Appeals relied on undisputed facts of the District Court's findings and affirmed the Order of the District Court granting the Defendants' Motion for Summary Judgment without opinion.

Petitioner misstates the holding of this Court in *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 115 S. Ct. 1043, 130 L.Ed.2d 1024 (1995) by stating that this Court determined that the crane carrying barge was in fact a vessel. On the contrary, in *Grubart* this Court stated that "[p]etitioners do not here seriously dispute the conclusion of each court below, that the Great Lakes barge is, for admiralty tort purposes, a 'vessel.' " *Compare* Petitioner's Petition for Writ of Certiorari at page 6 with 115 S. Ct. at 1049. Furthermore, in *Grubart* this Court was considering whether admiralty tort jurisdiction existed in a case where the owner of the vessel was attempting to seek shelter under the limitation of liability act for tort claims alleged against the owner of the vessel. Finally, in *Grubart* this Court specifically noted that the barge was at times used for transportation. *Id.* at 1049.

However, in the case *sub judice* there is absolutely no evidence to support that the barge in question was used for transporting cargo, equipment or passengers. Instead, the District Court specifically found that the barge in question was used for construction purposes. *District Court Order in Appendix C at pages 7a, 8a, 13a and 15a* of Petition for Writ of Certiorari.[3]

Although Petitioner claims that "his employers have testified that he was assigned to the barge" and that "all have testified that his duties contributed to the function of this vessel or to the accomplishment of its mission", there is no such testimony by Petitioner's employers in

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[3] Recently, in *Manuel v. P.A.W. Drilling & Well Service, Inc.*, 135 F.3d 344 (5th Cir. 1998), the Fifth Circuit Court of Appeals discussed the applicable law regarding whether a structure is a "vessel" under the Jones Act. Discussing its previous holding in *Ellender v. Kiva Constr. & Eng'g., Inc.*, 909 F.2d 803 (5th Cir. 1990), the Court stated in Footnote 7 the two factors which lead it to conclude that the transportation function of the structure was incidental to its use as a work platform. The Court stated as follows:

> First, the job constructing the platform was a single assignment for this flotilla. The flotilla did not travel from location to location as Rig 3 was assigned to do. Second, we infer from the facts stated in the opinion that the job was relatively close to shore and an insignificant amount of the flotilla's time was devoted to movement of the equipment and materials to the job site. The flotilla was engaged almost exclusively in performing construction work.

Id. at 350. Likewise, in the case *sub judice*, the District Court concluded that the barge in question was primarily used for construction purposes and that any transportation functions it served were incidental to its primary purpose of constructing the casino.

the record. In fact, Frank Jenkins of RAC testified in the company's Rule 30(b)(6) deposition that Petitioner worked wherever he was needed. *Compare* Petitioner's Petition for Writ of Certiorari at page 8 with *Appendix "A" herein.*

Furthermore, Petitioner claims that the District Court Judge's finding that the work platform was not a vessel is contradicted by the testimony of Mr. John E. Graham, who is *purported* to have stated that "this is a barge that is used to carry cargo and used in navigation over navigable waters." *See* Petitioner's Petition for Certiorari, at page 8. However, Mr. John E. Graham did not testify that the barge **in question** was used to carry cargo and used in navigation over navigable waters. Instead, Mr. Graham testified that "a barge of this **type** could be used to carry cargo. It could be used as a work platform. It could be used as a crane barge. It could be used as a buffer barge. Virtually any – any type of use that someone needs a floating steel box for, that barge would serve the purpose." (**Emphasis added**). *See Appendix "B"* herein.

There is absolutely nothing in the record to support Plaintiff's claim that the barge in question was used for any purpose other than as a work platform. Consequently, Petitioner failed to meet his burden to demonstrate that a jury issue existed as to whether or not he was a Jones Act seaman since there was no evidence to support a finding by the District Court that the barge in question served any other purpose other than the construction of a casino on Biloxi, Mississippi's Back Bay. Accordingly, although the question of seaman status is normally a question for the jury, Petitioner failed to "make a showing sufficient to establish the existence of an element essential to . . . [his] case, and on which

[he] . . . will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986). Therefore, summary judgment was appropriately granted. Consequently, given the fact that there is insufficient evidence to support Plaintiff's claim, this is not the type of issue on which this Court would ordinarily grant a writ of certiorari.

III.

THIS COURT SHOULD NOT EXPEND VALUABLE JUDICIAL RESOURCES ON A CASE IN WHICH THE SAME RESULT IS MANDATED ON SIMILAR ISSUES.

Since the District Court's granting of summary judgment, and prior to the Fifth Circuit Court of Appeal's affirmation of the District Court's Order, this Court in *Harbor Tug & Barge Co. v. Papai*, ___ U.S. ___, 117 S. Ct. 1535, 1540, 137 L.Ed.2d 800 (1997) held that in order for a person to maintain a claim under the Jones Act as a seaman, the plaintiff "must have a connection to a vessel in navigation (or to an identifiable group of such vessels) that is **substantial in terms of both its duration and its nature." (Emphasis added)**. Therefore, regardless of whether or not the barge in question is a "vessel" for Jones Act purposes, there is insufficient evidence for the Petitioner to show that he is a Jones Act seaman. At the time of Plaintiff's alleged injury, the Plaintiff was assisting the crane in reaching some materials. Other than being moved from time to time by means of a tug boat to other areas immediately within the construction site, the crane barge was at all other times stationary. The crane barge was securely held in place by two large pilings, "big pins" which went down in to the dirt. Accordingly,

there is absolutely no evidence to suggest that the Petitioner is the in the class of persons whom this Court has found to be entitled to remedies under the Jones Act. The Jones Act was intended to protect sea-based maritime workers who owed their allegiance to a vessel, and not land-based employees, who do not. *Chandris, Inc. v. Latsis*, 515 U.S. 347, 369-72, 115 S. Ct. 2172, 2194 (1995). Furthermore, rights to recovery under the Jones Act for seamen depends on the nature of his service and his relationship to operation of a vessel "plying in navigable waters". *Chandris*, 115 S. Ct. at 2185-2186. Although this Court has recognized that Jones Act remedies may be available to maritime workers who are employed by shipyards, those persons must be workers who "spend the rest of their time at sea." *Chandris*, 115 S. Ct. at 2187-2188. The purpose of the Jones Act remedy "is reserved for sea based maritime employees whose work regularly exposes them to 'the special hazards and disadvantages to which those who go down to sea in ships are subjected.' " *Chandris*, 115 S. Ct. at 2190. As noted by Petitioner in his Petition for Certiorari, the accident alleged by Plaintiff occurred on a barge which was used in the construction of a casino on the back bay of Biloxi, Mississippi. Accordingly, Petitioner is not in the class of workers who are subjected to the perils and the hardships of the sea for which the Jones Act was intended. Thus, Petitioner does not have a connection to the barge in question that is substantial in either its duration or nature. Petitioner is a land-based worker with other remedies appropriately available to him under the law.

CONCLUSION

For the foregoing reasons stated herein, this Court should deny the Petition for Writ of Certiorari that has been presented to the Court. This case does not present an issue which is a compelling reason for this Court to grant Certiorari and does not present a question for review that is in conflict with the decision of another United States court of appeal on this matter. Furthermore, Petitioner failed to meet his burden to come forth with sufficient evidence to overcome the District Court's granting of summary judgment and the Fifth Circuit's affirmation thereof. Accordingly, this Court need not further review such findings where Petitioner failed to meet his burden. Moreover, a wholly and independent basis exists pursuant to this Court's holding in *Papai* and *Chandris* to find that Petitioner is not a seaman. Consequently, Petitioner does not meet the requisite threshold to assert a claim under the Jones Act and therefore, there is no compelling reason for this Court to grant the writ.

Respectfully submitted,

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APPENDIX A

Record pages 163-164, 168

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

PAUL CLARK	PLAINTIFF
VERSUS	CIVIL ACTION NO. 1:94CV585RR
ROY ANDERSON CORPORATION, JOHN DOE and R. A. BUILDING CORPORATION	DEFENDANTS

30(B) (6) DEPOSITION OF FRANK JENKINS

Taken on behalf of the Plaintiff, Friday, June 7, 1996, commencing at 9:42 a.m., at the offices of Bryant, Clark, Dukes, Blakeslee, Ramsay & Hammond, located at 2223 – 14th Street, in the City of Gulfport, County of Harrison, State of Mississippi, before Judi S. Morrow, CSR No. 1254 and Notary Public, within and for the County of Harrison, State of Mississippi.

APPEARANCES:

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ALSO PRESENT:

Brandi Sinopoli, Court Reporting Intern

INDEX

EXAMINATION BY: PAGE

Mr. Pringle 4
Mr. Dukes 49
Mr. Guilbeau 53
Mr. Dukes 55

EXHIBITS:

Exhibit 1. Extension of Information Page Item 4 Premium Schedule 4
Exhibit 2. Longshore and Harbor Workers' Compensation Act Coverage Endorsement 4

Exhibit 3. Maritime Coverage Endorsement 4
Exhibit 4. Voluntary Compensation Maritime Coverage Endorsement 4
Exhibit 5. Invoice No. 508696 Dated 9/01/94..... 4
Exhibit 6. Safety Meeting Form Dated 5/9/94..... 4
Exhibit 7. Safety Meeting Form Dated 3/28/94..... 4

* * *

[p. 8] A. Yes, I did.

Q. Do you know what Paul Clark's job was at the Boomtown Casino project?

A. I think he was classified on his paperwork as an ironworker, but we were using him as a rigger.

Q. Can you try to give me a job description of what a rigger would be?

A. When you're moving material with a crane, he rigs it, hooks it up to the crane; and whenever it's landed wherever it might be going, then he unhooks it. That's basically his duties.

Q. All right. And was Mr. Clark assigned to work on a particular barge or with a particular crane at Boomtown?

A. He was a rigger. Now, when you say a particular barge or a particular crane, he was more or less wherever the crane went, I mean, if you needed him on another crane and not to say that he was just stuck with this crane. I just want to clarify that. He was wherever you needed him.

* * *

APPENDIX B

Record pages 193-194, 202

[p. 1] UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

SOUTHERN DIVISION

PAUL CLARK NO.: 1:95CV585RR

VERSUS

ROY ANDERSON CORPORATION,

JOHN DOE AND R. A. BUILDING

CORP.

The deposition of MR. JOHN E. GRAHAM, taken in the above-entitled cause before Holly Bergeron, a Certified Shorthand Reporter, authorized to administer oaths of witnesses, pursuant to Section 961.1 of Title 13 of the Louisiana Revised Statutes of 1950, as amended, pursuant to the following stipulation, taken in the offices of McDonough Marine Service, 2300 Surekote Road, New Orleans, Louisiana, on the 28th of August, 1996.

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FOR THE DEFENDANT

REPORTED BY:

HOLLY BERGERON, CCR
Registered Professional Reporter

* * *

[p. 13] Q: Is that the type of barge that your company does lease?

A. Yes.

Q. All right. Again, the type of barges as in Exhibit 1, what type of leases do you do for that type of barge – the uses that that barge would be used for?

A. Well, a barge of this type could be used to carry cargo. It could be used as a work platform. It could be used as a crane barge. It could be used as a buffer barge. Virtually any – any type of use that someone needs a floating steel box for, that barge would serve the purpose.

* * *